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No. 74-103

In the Supreme Court of the United States

OCTOBER TERM, 1974

WILLIAMSON MARINE TRANSPORT, INC., TRI-W TOWING COMPANY, INC., AND GREENVILLE TOWING COMPANY, INC.,
Petitioners,

v.

LOUISIANA TAX COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it Please the Court:

I

Statement of the Case

These proceedings were commenced by Petitioners challenging the constitutionality of tax assessments for the years 1973 and 1974 made by the Louisiana State Tax Commission. These assessments were made pursuant to *LA-R.S. 47:1984; La. Act No. 59 of 1944.* Petitioners claim these assessments violate the Due Process Clause of the Fourteenth Amendment and the

Commerce Clause of the United States Constitution, *U. S. Const., Article 1, Sec. 8, Cl. 3; U. S. Const., Amendment Article XIV, Sec. 1.*

Respondent answered Plaintiffs' original and amended petitions; then filed an exception of no cause of action on the ground that the United States Supreme Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S.Ct. 432 (1949) upheld Respondent's right to tax Plaintiffs under the factual allegations contained in Plaintiffs' petition.

Argument on Respondent's rule to show cause was heard on September 4, 1973, and on September 21, 1973 the Louisiana District Court handed down written reasons sustaining Respondent's peremptory exception of no cause of action, *Petitioners' Appendices B 5a.* Judgment in favor of Respondent and against Plaintiffs dismissing the action at Plaintiffs' cost was signed on October 19, 1973. Thereafter, Plaintiffs filed a petition praying that they be granted a devolutive appeal from said decision, and on October 23, 1973, the District Court granted a devolutive appeal. The Court of Appeal, First Circuit, State of Louisiana, affirmed the judgment of the District Court on March 18, 1974, *Petitioners' Appendices C 9a.* Rehearing was refused April 22, 1974. Application for a writ of certiorari to the Court of Appeal, First Circuit was made to the Louisiana Supreme Court. The writ was denied by the said Supreme Court on May 31, 1974 which held that there was no error of law.

Petitioners now seek a writ of certiorari from

this Court to review the decisions of the Louisiana Court of Appeal and Supreme Court.

II

Statement of the Facts

Respondent recognizes, that for the purpose of this application, the well pleaded facts of Petitioners are to be accepted as true. Those statements in Plaintiffs' petition which are conclusions of law as stated in the District Court's reasons for judgment need not be accepted as true.

Plaintiffs' petition states that their businesses consist solely of the conducting of towage operations whereby they tow barges from outside Louisiana into the State to the port of New Orleans and Baton Rouge. Plaintiffs allege that all cargoes are solicited from outside the State; further, that they are entities organized and created under the laws of other States owning no property or other assets in the State of Louisiana. Plaintiffs' aver that they have no offices, agents or employees in Louisiana. Plaintiffs further concede and stipulate, that their vessels also carry cargo back up river out of the State of Louisiana.

Plaintiffs' other allegations are conclusions of law, as stated by the District Court. Specifically the allegation that Plaintiffs have no contact with the State of Louisiana sufficient to create a situs for taxation of its barges and tow boats is a legal conclusion which restates the very constitutional point at issue.

III

Argument

Respondent contends that the right of the State of Louisiana to impose ad valorem tax assessments on barge lines whose lines are partly within the State of Louisiana was conclusively settled by the United States Supreme Court in *Ott v. Mississippi Valley Barge Line Co.* 336 U.S. 169, S.Ct. 432 (1949).

Plaintiffs' list three requirements which they feel are necessary in order for an ad valorem tax to be imposed on a taxpayer engaged in interstate commerce.

(1) The taxpayer must maintain such minimal contacts within the taxing State so as to be deemed doing intrastate business in the State;

(2) The property sought to be taxed must be present within the taxing State;

(3) The tax must be properly apportioned so that it bears a relation to the benefits afforded by the taxing State.

Plaintiffs claim that the existence of offices or agents was a fundamental factor in the *Ott* decision and that in the present case there are no offices or agents.

The logic of Plaintiffs must fail as any doubt as to what *Ott* says can be resolved by reading the decision of the court in that case. If, as Plaintiffs state, the existence of offices and agents in the State was a fundamental basis for the *Ott* decision, then why did the Supreme Court make no further mention of this

fact except that one sentence in the first paragraph of the decision which reads:

> "Each has an office or agent in Louisiana but its principal place of business is elsewhere."

It seems rather incredible that if this one sentence was the fundamental basis for the decision in *Ott* that no mention or discussion of the importance of that fact would be made by the Court at any place in its decision.

Further, the Statute under which these assessments are made, *La. R.S. 47:1984, La. Act 59 of 1944* would have been declared unconstitutional by the United States Supreme Court in the *Ott* case. It is well established law that courts must construe statutes as they are written.

The existence of offices and agents in the *Ott* case played no part in the decision of the United States Supreme Court.

Plaintiffs are correct however in stating that minimal contact with the State is necessary for taxation.

The test, however, for what is the minimal contact required was clearly stated by the U.S. Supreme Court in *Ott v. Mississippi Valley Barge Line Co.*, 69 S.Ct. 432, 435, 336 U.S. 169, 175:

> "It is argued that the doctrine of the Pullman case is inapplicable here because its basis is the continuous protection afforded by the taxing state throughout the tax year to a portion of the commerce. See 141 U.S. at page 26, 11 S.Ct. at page

879. (citations omitted). It is said in this case that the visits of the vessels to Louisiana were sporadic and for fractional periods of the year only and that there was no average number of vessels in the state every day. The District Court indeed said that there was no showing that the particular portion of the property sought to be taxes was regularly and habitually used and employed in Louisiana and for the whole of the taxable year.

We do not stop to resolve the question. Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here an average portion of property permanently within the State — and by permanently is meant throughout the taxable year.' Appellees do not suggest an absence for any administrative or judicial remedy in Louisiana to correct error in the assessments."

The position of the State of Louisiana as to who is covered by the statute is the same as it was in 1949. As the Louisiana District Court in its written reasons for judgment stated:

"Plaintiffs do not say that the Tax Commission has unfairly apportioned the tax assessments in question. They merely charge 1) that there is not sufficient connection between the State of Louisiana and their towing business to support the tax here levied, and 2) that the challenged tax places an undue burden in inter-state commerce."

Since *La. R.S. 47:1984* has been determined in the *Ott* case to be constitutional, if Plaintiffs feel they do

not come under the coverage of the statute because they feel they are not doing sufficient business to be considered minimal contact as defined in *Ott*, they have a right to judicial review of the assessment made which review is provided for in *La. R.S. 47:1984(4)*.

Instead of asserting this right, Plaintiffs have taken the position that a lack of physical presence of agents or employees in the State, in and of itself, prohibits the taxing power of the State of Louisiana from being applicable to them.

To support their position Plaintiffs cite *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357 (1959), and *National Bellas Hess, Inc. vs. The Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389 (1967). These cases involve privilege and use taxes and not ad valorem taxes that we are concerned with here.

Privilege or use taxes are not at issue here and Respondent claims no right under the statute in question to exact such taxes from Plaintiffs.

As the Supreme Court of the United States stated in *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876 (1891).

> "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits.
>
> But in each of those cases the tax was not

upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. (Citations omitted).

The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state to other states in countries. The tax is imposed equally on corporations doing business within the states, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is in substance and effect, a tax on that property."

Plaintiffs further cite *Brainiff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347, U.S. 590, 74 S.Ct. 757 (1954). In view of the fact that reference was made to rented ground facilities, Plaintiffs feel this case supports their position. To the contrary this case, as does *Ott*, supports the position that interstate commerce can be made to bear a non-discriminatory portion of the tax burden of the State where the tax bears a relation to benefits conferred by the State. The rented facilities had no relation to the tax as the property being taxed was aircraft flight equipment determined to be permanently in the State although used in interstate commerce.

IV

Conclusion

In summary, Respondent feels that the jurispru-

dence is clear that having offices or agents is not the test for ad valorem taxation as it might be for a tax on gross receipts. The minimal contact requirement is met by Petitioners having an average portion of property permanently within the State throughout the taxing year as stated by the Supreme Court of the United States in *Ott v. Mississippi Valley Barge Lines*, supra. Further, because the statute in question makes no mention of offices or agents as Plaintiffs suggest, this factor could not have played any part in the decision of the U.S. Supreme Court in the *Ott* case as the Court was bound to rule on the statute as written, which in fact the Court did in holding *La. Act 59 of 1944* constitutional.

There is no violation of the Due Process and Commerce Clauses of the U.S. Constitution.

Respectfully submitted,

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CERTIFICATE

I hereby certify that copies of this brief have been duly served on counsel of record in this cause by transmitting the same to them by United States mail in accordance with the Rules of this Court, postage prepaid, at their record respective addresses.

September_____, 1974.

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